



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Aero Independent Bearing Company, Inc.

File: B-258017; B-258017.2

Date: November 29, 1994

Mark L. Lebovitz for the protester,
Cynthia Emerson, Esq., Defense Logistics Agency, for the
agency.
Behn Miller, Esq., and Christine S. Melody, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Protest that bidder's failure to submit required bid deposit with bid should be waived is denied where record shows that failure to timely submit bid deposit was the result of the bidder's delay in making necessary arrangements to comply with clear instructions in the solicitation regarding acceptable forms of bid deposit.
2. Protest of agency's refusal to accept multiple credit card bid deposit is untimely where--notwithstanding solicitation's clear warning that multiple credit card bid deposit would not be accepted by the agency--protester failed to challenge this restriction until after bid opening.
3. Protest challenging two awardees' bid deposits on ground that bid deposits do not equal 20 percent of each awardee's total bid price is denied where agency reasonably concluded that the government's interests were adequately protected since bid deposits constituted 20 percent of the actual awarded quantity.

DECISION

Aero Independent Bearing Company, Inc. protests the award of various bid lots under invitation for bids (IFB) No. 31-4419, issued by the Defense Reutilization and Marketing Service (DRMS), Defense Logistics Agency (DLA), for the sale of surplus aircraft parts and materials. Aero contends that the agency should not have rejected its bid, and that the agency improperly relaxed the bid deposit requirement for two of the awardees.

We deny the protest.

The IFB sought bids for 187 lots of aircraft items. Under the terms of the IFB, each lot was to be awarded on an item by item basis to the highest bidder for that particular lot; thus, multiple awards were contemplated.

The IFB required bidders to submit a bid deposit equal to 20 percent of the total bid price and provided that the bid deposit could be made by cash, cashier's check, certified check, traveler's check, bank draft, money order, or by charge to a "VISA" or "MasterCard" credit card account. In the event bidders chose to submit their bid deposit by means of a credit card charge, the solicitation warned that "SUBMISSION OF MULTIPLE CREDIT CARDS IS NOT ACCEPTABLE AND WILL RESULT IN THE BID BEING REJECTED AS NONRESPONSIVE." (Emphasis in original.)

On the morning of July 28, 1994--the bid opening date--Aero contacted the agency and advised the contracting officer that it could only submit a credit card bid deposit if it were permitted to utilize three different credit cards for a portion of the total bid deposit amount. Relying on the solicitation provision set forth above, the contracting officer advised Aero that a multiple credit card bid deposit would not be accepted by the agency. The protester then asked if there was any other way to satisfy the bid deposit requirement. In response, the contracting officer suggested that Aero satisfy the requirement by means of a Western Union wire transfer of a cashier's check.

According to Aero, because of time constraints, Western Union was unable to successfully transfer the required bid deposit that same day to the contracting agency; consequently, although Aero's bid referenced a Western Union bid deposit, no bid deposit accompanied its bid. At the 3:00 p.m. bid opening, Aero was the high bidder for nine of the bid lots. After checking with Western Union, the agency learned that no bid deposit had been transferred to the agency by the 3:00 p.m. bid opening deadline. Consequently, when Aero contacted the contracting officer's supervisor by telephone to ascertain the bid results, it was advised that its bid would be rejected as nonresponsive due to a bid guarantee deficiency.

The following day, Aero submitted a multiple credit card bid deposit to the agency; however, because this deposit was not received until after bid opening, the agency rejected Aero's bid as nonresponsive and awarded the nine lots to the next highest bidders for these items. That same day, Aero filed this protest with our Office.

A bid deposit is a form of bid guarantee designed to protect the government's interests in the event of a bidder's default; with respect to surplus sale procurements, a bid deposit obligates a bidder not to withdraw before award and to pay the full purchase price. N.G. Simonowich, 70 Comp. Gen. 28 (1990), 90-2 CPD ¶ 298. The requirement to submit a binding bid deposit is material and must be met as of the time of bid opening. Id. In this case, Aero contends that its failure to submit a bid deposit should be waived, since it resulted from Aero's reliance on the contracting officer's advice to use Western Union to submit its bid deposit. We see no basis to challenge the agency's action in this regard or to conclude that the rejection of the bid was improper.

The solicitation not only specified the various forms of bid deposit that were acceptable, but also clearly stated that the use of multiple credit cards was not acceptable. The record shows that, despite the clear language of the solicitation, Aero telephoned the contracting officer on the morning of bid opening to inquire whether it could use multiple credit cards to satisfy the bid deposit requirement. When told that this would not be acceptable--as unequivocally stated in the solicitation itself--Aero then asked the contracting officer to suggest other means of satisfying the requirement. Given the short time remaining before bid opening, the contracting officer suggested that Aero use a Western Union transfer. The record shows that Western Union was unable to carry out the transfer requested by Aero, and, as a result, Aero's bid was received by the agency without an accompanying bid deposit.

Nothing the contracting officer said to Aero could be interpreted to have prevented a timely, complete submission by Aero; on the contrary, it was the delay by Aero itself in making the necessary arrangements to comply with the instructions in the solicitation that resulted in Aero's failure to submit a bid deposit with its bid. At most, the contracting officer's suggestion was an attempt to assist Aero in response to a request for advice from Aero as to how it could satisfy the bid deposit requirement. It is each bidder's responsibility to see that its bid is timely received. B.E.C. Medical Prods., B-256483, Feb. 28, 1994, 94-1 CPD ¶ 159. Aero's failure here to timely submit a bid deposit was the result of actions by Aero, not the contracting agency--in essence, waiting until shortly before bid opening to attempt to make arrangements to submit a bid deposit in conformance with the clear instructions in the solicitation. Contrary to Aero's position, there simply is no basis to conclude that timely submission of the bid deposit was prevented by some affirmative government action. See Braceland Bros., Inc., B-248234, Aug. 3, 1992, 92-2 CPD ¶ 69.

To the extent Aero contends that it was improperly denied the opportunity to submit a multiple credit card bid deposit, its protest is untimely. Our Bid Protest Regulations contain strict rules requiring timely submission of protests; these timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolve protests expeditiously without unduly disrupting or delaying the procurement process. Servicio Internacional de Proteccion Baker, S.A., B-241670, Jan. 22, 1991, 91-1 CPD ¶ 64. Under our timeliness rules, protests based upon alleged improprieties in a solicitation--such as the challenged restriction against multiple credit card bid deposits--must be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1994). As noted above, this IFB clearly notified all offerors that the agency would not accept multiple credit card bid deposits; consequently, Aero was required to raise any protest challenging the propriety of this bid deposit policy prior to the July 28 bid opening. Since it did not, any challenge to the propriety of the agency's refusal to accept multiple credit card bid deposits is untimely and not for consideration on the merits. See A-1 Stevens Van Lines, Inc., B-243358.2, May 20, 1991, 91-1 CPD ¶ 485.

Aero also argues that the agency improperly accepted deficient bid deposits from two of the awardees--Dorothy Heller and Pioneer Bearing Corporation. To be compliant with the IFB's 20 percent bid deposit provision, Heller should have submitted a \$32,682.25 bid deposit, and Pioneer should have submitted a \$24,129.00 bid deposit. The agency report shows that the bid deposits submitted by each awardee did not constitute 20 percent of each awardee's total bid:

	Total Bid Price	Bid Deposit Amount
Heller	\$163,411.25	\$30,682.25
Pioneer	\$120,645.00	\$12,000.00

This noncompliance, however, does not require rejection of the bids.

Although neither the solicitation nor DLA's Sale By Reference pamphlet provides any guidance for this situation, the Federal Acquisition Regulation (FAR)¹ permits the

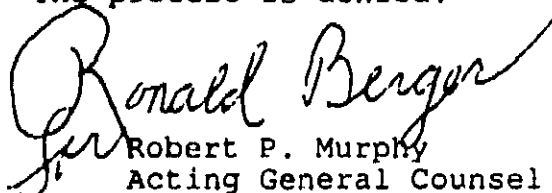
¹While the FAR does not govern sales solicitations, the strict rules governing bid responsiveness applicable to sealed bid procurements are generally applicable to sealed-bid sales. See Hankins Lumber Co., Inc., B-248108, July 27, 1992, 92-2 CPD ¶ 50. In addition, the Federal Property Management Regulations (FPMR)--which governs surplus

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contracting agency to waive an offeror's noncompliance with a bid deposit amount requirement, where--as here--the amount of the submitted bid deposit, although less than that required by the IFB for the maximum quantity offered, is sufficient to indemnify the government for at least 20 percent of the award quantity. See FAR § 28.101-4(c)(3).

The bid abstract shows that Heller was the high bidder for 20 bid lots resulting in a total contract award price of \$113,957.74; Pioneer was the high bidder for 7 bid lots resulting in a total contract award price of \$23,276.95. Although both Heller's and Pioneer's bid deposits did not constitute 20 percent of their total bid prices, the record shows that each one's bid deposit was sufficient to indemnify the government for at least 20 percent of the actual award amount. Heller's bid deposit of \$30,682.25 is more than 20 percent (\$22,791.55) of the Heller award price, and Pioneer's bid deposit of \$12,000 is more than 20 percent (\$4,675.33) of its award price. Given that each awardee's submitted bid deposit indemnifies the government for at least 20 percent of the actual award amount, we think the government's interests were sufficiently protected in the event of bidder default just as they would have been in a procurement subject to the FAR. Accordingly, we believe the agency reasonably could waive the bidders' noncompliance with the total bid price bid deposit amount.

The protest is denied.


 Robert P. Murphy
 Acting General Counsel

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property sales--sets forth bid deposit requirements which echo the bid deposit policy set forth in the FAR. For example, with regard to term contracts, the FPMR states that "the normal deposit shall not be less than an amount which will adequately protect the [g]overnment's interest, normally 20 percent of the estimated contract price." 41 C.F.R. § 101-45.304-10(a) (1994).